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IN THE
COURT OF APPEALS OF INDIANA

NICHOLAS D. THOMAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A05-0601-CR-37
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Scott R. Bowers, Judge
Cause No. 82D02-0410-FA-810

October 2, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Nicholas D. Thomas appeals four convictions of Robbery,[1] one as a class A felony and three as class B felonies, and the determination that he is an Habitual Offender.[2] Thomas presents the following restated issues:

(1) Did the trial court abuse its discretion by restricting cross-examination of a witness?

(2) Did the trial court abuse its discretion by requiring two defense witnesses to testify while handcuffed?

(3) Did the trial court err in identifying aggravating circumstances or imposing maximum, consecutive sentences?

(4) Was his sentence appropriate?

We affirm in part, reverse in part, and remand with instructions.

The facts favorable to the convictions are that at approximately 4:00 a.m. on October 15, 2004, Lisa Atchison went to the Days Inn (the hotel) in Evansville to meet Cassie Brooks, Jasone Parsons, and Brett Clark (collectively, the victims) in room 215. Sometime between 4:30 a.m. and 5:30 a.m., there was a knock on the door. Clark opened the door, and Ashley Carter, Mandy McRoy, and Becky Edwards entered the room. As Clark began to shut the door, Christopher Raymer and Thomas attempted to enter the room. Clark struggled to shut the door, but Raymer and Thomas overpowered Clark and forced their way into the room. The reason Thomas "was there was because the week before that [Clark] had beaten up [Thomas's] . . . fifteen year old [sic] cousin and . . . had

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[1] Ind. Code Ann. § 35-42-5-1 (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006).

[2] Ind. Code Ann. § 35-50-2-8 (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006).

taken a gun from him . . . ." *Transcript* at 51. After Raymer and Thomas entered the room, Thomas brandished a gun from the waistline of his pants. "[A]s soon as [] [Thomas and Raymer] came through the door they hit [Clark] in the head with a gun and then [Clark] fell to the floor and they just continuously beat him up like stomped on him with their feet on his head and just beat him up with a gun and stuff." *Id.* at 92. Thomas and Raymer "[w]ere basically throwing [Clark] back and forth hitting him [and doing] whatever they could do to hurt him." *Id.* at 48.

Before Thomas, Raymer, Carter, McRoy, and Edwards left the room, they took: Atchison's engagement ring, "butterfly ring", *id.* at 49, "belly button ring", *id.* at 50, clothes, and twenty dollars; Parsons's cellular telephone, wallet, and car keys; a phone that belonged to the hotel; a woman's coat; Brooks's clothes, purse, belly button ring, bracelet, and earrings; and Clark's cellular telephone, blankets, gun, black bag, and clothes. "[R]ight before [Thomas, Raymer, Carter, McRoy, and Edwards] were done doing everything . . . [Thomas] walked up to [Clark] and put the gun down to his head and . . . said ['']I should've killed you['] . . . ." *Id.* at 51. By the time Atchison left the room several minutes later, Clark "was laying [sic] on the floor [], he had blood coming out of his mouth [and] all he had on was his boxers and he was moaning and . . . he couldn't control anything . . . ." *Id.* at 55.

Atchison, Brooks, and Parsons left Clark lying on the floor of the hotel room. Approximately ten minutes after leaving the hotel, Brooks made an anonymous 911 call from a pay phone located in the parking lot of a nearby gas station. When police and emergency personnel arrived, they found Clark unconscious, and his blood on the interior

doorframe, the carpet, the corner of the bed, a blanket, a yellow shirt, and a Styrofoam pad. Clark was taken to the hospital where a CAT scan and MRI revealed his brain was bleeding and was otherwise injured, and he had a non-displaced skull fracture.

The State charged Thomas with one count of robbery resulting in serious bodily injury to another person, a class A felony, three counts of robbery while armed with a deadly weapon, class B felonies, and with being an habitual offender. The State filed a pretrial motion in limine seeking to exclude evidence of "acts of misconduct or specific bad acts" by the victims. *Appellant's Appendix* at 34. That is, Atchison went to the hotel to purchase marijuana, the victims smoked marijuana before Thomas arrived at the hotel, and Clark's black bag contained crystal methamphetamine and marijuana. The trial court granted the State's motion in limine.

At trial, two witnesses, Raymer and Jessy Suttle, were called to establish an alibi for Thomas. At the time of trial, Raymer was serving a twenty-year sentence for armed robbery and Suttle was serving a fifteen-year sentence for aggravated battery. Before both Raymer and Suttle testified, Thomas requested that the trial court permit handcuffs to be removed from their wrists during their testimonies, which the trial court denied. Following trial, the jury returned verdicts of guilty on all four counts of robbery, and found Thomas to be an habitual offender. The trial court found six aggravating factors, no mitigating factors, and imposed a fifty-year sentence of imprisonment for the class A felony conviction, which it enhanced by thirty years based on the habitual offender finding, and a twenty-year sentence of imprisonment for each of the three class B felony convictions. The trial court ordered the sentences for all four convictions to run

consecutively, for an aggregate sentence of 140 years of imprisonment. Thomas now appeals. Additional facts will be provided as necessary.

1.

Thomas contends the trial court erred when it restricted cross-examination of Atchison, the State's witness. A criminal defendant's due process rights include the opportunity to examine the prosecution's witness for purposes of challenging her testimony and the right to put before a jury evidence that may influence the determination of guilt. *Redding v. State*, 844 N.E.2d 1067 (Ind. Ct. App. 2006). The rights to confront and cross-examine a witness and to present evidence on one's own behalf are critical for ensuring the integrity of the fact-finding process, and are essential to a fair trial. *Id.* These rights, however, are not absolute, and may yield to other legitimate interests in the criminal trial process. *Id.* Trial courts retain wide latitude to impose limits based on concerns about, among other things, confusion of the issues or to limit introduction of evidence that is only marginally relevant. *Lampitok v. State*, 817 N.E.2d 630 (Ind. Ct. App. 2004), *trans. denied*. Therefore, although the right to confront and cross-examine a witness is fundamental, it is a right subject to reasonable limitations placed upon it at the trial court's discretion. *Id.* We review a trial court's decision to restrict cross-examination of a witness for a clear abuse of that discretion. *Rhea v. State*, 814 N.E.2d 1031 (Ind. Ct. App. 2004), *trans. denied*.

The State filed a pretrial motion in limine seeking to exclude evidence of "acts of misconduct or specific bad acts" by the victims, which the trial court granted. *Appellant's Appendix* at 34. Outside the jury's presence, Thomas elicited testimony from

Atchison that she traveled to the hotel in order to purchase marijuana, that the victims smoked marijuana before Thomas arrived, and that Clark's black bag contained crystal methamphetamine and marijuana. Pursuant to the State's motion, the trial court did not permit Thomas to introduce this testimony. It is well settled that, while evidence of drug use affecting a witness's ability to recall underlying events is relevant, evidence of past drug use may be excluded at trial. *Williams v. State*, 819 N.E.2d 381 (Ind. Ct. App. 2004), *trans. denied*. Further, evidence of a witness's prior drug use may be relevant as to the witness's inability to relate the facts at trial or the witness's mental capacity. *West v. State*, 755 N.E.2d 173 (Ind. 2001). Thomas did not assert that Atchison's testimony would have been relevant for any of these reasons. The trial court, therefore, did not abuse its discretion in failing to permit testimony as to Atchison's purpose for traveling to the hotel, that the victims smoked marijuana, or her knowledge concerning Clark's drug possession. *See id.*; *Trice v. State*, 519 N.E.2d 535, 537 (Ind. 1988) (testimony of government witness's alleged involvement in drug dealing was "totally irrelevant").

2.

Thomas contends the trial court erred when it required two defense witnesses to testify while handcuffed. The State responds that Thomas waived review of this issue because he did not object during trial. We agree. "As a general rule, failure to object at trial results in waiver of an issue for purposes of appeal." *Washington v. State*, 840 N.E.2d 873, 886 (Ind. Ct. App. 2006) (quotations omitted), *trans. denied*. At trial, the following exchange occurred between the trial court and the parties:

> [Defense Counsel]: Your Honor, I would ask [that] my next witness . . . not be in handcuffs when he testifies.
>
> State: Deputy . . . what's your preference[?]
>
> Court Deputy: Whatever you say, Your Honor.
>
> Court: Okay[.]
>
> State: He is . . . a convicted felon with a fifteen year prison sentence.
>
> Court: Okay, I'd prefer he does remain . . . shackled then. . . .
>
> [Defense Counsel]: I assume then the record will show . . ., Your Honor, that he is in handcuffs.
>
> Court: Mm hm.
>
> [Defense Counsel]: Thank you.
>
> Court: I mean he'll be in whatever security status the Deputy brings him in.
>
> [Defense Counsel]: Yeah and *I'm not taking issue* I just for the record I need to . . .
>
> Court: Do you have any authority that makes that an approved practice[?]
>
> [Defense Counsel]: I . . . haven't started writing the [a]ppeal yet, Your Honor, so . . .
>
> Court: Okay, . . . I know of no such authority and I wanted to give you the opportunity to educate the Court if you in fact knew something I didn't.
>
> [Defense Counsel]: I haven't . . . had an opportunity to ah, research that so [. . . .]

Transcript at 288-89 (emphasis supplied). Thomas repeated his request for a second witness's handcuffs to be removed, which the trial court denied. In summary, Thomas made no objection to the witnesses remaining in handcuffs, stated he was "not taking issue" with the trial court's decision to not remove the handcuffs from the witnesses, and,

when asked, provided the court with no authority or basis for removal of the handcuffs. *Id.* at 289. Thomas, therefore, has waived review of this issue by failing to object. *See Washington v. State*, 840 N.E.2d 873 (issue waived because counsel failed to object to a juror's question).

3.

Thomas contends "the only considerations that are permissible in determining whether the defendant should have received a sentence in excess of the presumptive sentence was his prior criminal record." *Appellant's Brief* at 15. This contention is apparently based in part upon *Blakely v. Washington*, 542 U.S. 296 (2004), and in part upon Thomas's argument that several aggravating circumstances relied upon by the trial court were derivative of his criminal history. We will address both contentions concurrently. The State contends Thomas has waived his *Blakely* challenge because he did not raise it at trial. Although Thomas did not raise a *Blakely* challenge at trial, he did raise such in his initial brief. Thomas, therefore, has not waived his *Blakely* claim. *See Tracy v. State*, 840 N.E.2d 360 (Ind. Ct. App. 2006) (appellant did not forfeit his *Blakely* claim on appeal, despite not raising such at trial, because he made a *Blakely* claim in his initial appellate brief).

We now turn to the merits of Thomas's argument. The Court in *Blakely* applied and refined the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Burks v. State*, 838 N.E.2d 510 (Ind. Ct. App. 2005), *trans. denied*. "Other than the fact of a prior conviction, a fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*

v. Washington, 542 U.S. at 302. The "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *Id.*

> Pursuant to *Blakely*, "a trial court in a determinate sentencing system such as Indiana's[3] may enhance a sentence based only on those facts that are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived *Apprendi* rights and stipulated to certain facts or consented to judicial factfinding."

Burks v. State, 838 N.E.2d at 524-25 (quoting *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005)) (footnote supplied). Thus, where, as here, the defendant did not admit facts through a guilty plea, without violating *Apprendi* and *Blakely*, his sentence may be enhanced based only upon facts reflected in the jury's verdict, facts admitted by the defendant, and the fact of a prior conviction. *Burks v. State*, 838 N.E.2d 510. Further, facts that are derivative of a defendant's criminal history cannot serve as separate aggravating circumstances. *See Pinkston v. State*, 836 N.E.2d 453 (Ind. Ct. App. 2005) (need for rehabilitative treatment not a separate aggravating factor because it is derivative of criminal history), *trans. denied*.

The trial court found as aggravating: (1) Thomas's criminal history, including felony convictions of possession of a schedule II controlled substance, dealing in a schedule II controlled substance, twice for auto theft, escape, and resisting law enforcement, and misdemeanor convictions of conversion, battery, violation of a liquor law, possession of marijuana, twice for public intoxication, and false reporting, all of

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[3] We note the General Assembly revised Indiana's sentencing statutes to eliminate "presumptive sentences" and establish "advisory sentences." *See* P.L. 71-2005 (effective April 25, 2005).

which occurred between March 6, 1997 and March 20, 2002; (2) the instant offenses were committed while Thomas was on parole; (3) "the [] concerted action involved", *transcript* at 380; (4) that Thomas "clearly feels that all [of] his problems in life . . . are somebody else's fault . . .", *id.* at 381; (5) "failures on Community Corrections," *id.* at 380; and (6) that Thomas "pose[s] a great, great menace in the future . . . ." *Id.* at 380. The trial court found no mitigating circumstances,[4] and stated that, "based on that [it is] sentencing [Thomas] on Count I as . . . enhanced by the Habitual Offender Count to eight[y] years executed, twenty years executed on Counts II, III, and IV respectively, all counts to run consecutively . . . ." *Id.* at 381.

The first aggravator was Thomas's criminal history, which was proper. *Stewart v. State*, 840 N.E.2d 859 (Ind. Ct. App. 2006), *trans. denied*. The second aggravator was that Thomas committed these crimes while on parole. This is a valid aggravating factor, and is not derivative of Thomas's criminal history. *See Field v. State*, 843 N.E.2d 1008 (Ind. Ct. App. 2006) (neither violation of the conditions of bond nor probation violation is derivative of criminal history), *trans. denied*. The third aggravating factor was the "concerted action involved". *Transcript* at 380. This was not a valid aggravating factor because it was not reflected in the jury's verdict. *See Edwards v. State*, 822 N.E.2d 1106 (Ind. Ct. App. 2005) (trial court's use of planning and preparation as aggravating circumstances was improper where such were not required to convict defendant). The fourth aggravating factor was that Thomas blames his problems on others. This is an

[4] Thomas does not challenge the trial court's failure to find mitigators.

improper aggravating factor because it was not reflected in the jury's verdict. *See Sowders v. State*, 829 N.E.2d 18 (Ind. 2005) (use of failure to accept responsibility as an aggravating factor was improper). The fifth aggravator was that Thomas violated several community corrections programs. While valid, this was not a separate aggravating factor because it was derivative of Thomas's criminal history. *See Neff v. State*, 849 N.E.2d 556 (Ind. 2006) (failure to rehabilitate is not a separate aggravating factor). The sixth aggravating factor was that Thomas poses a menace to society. While valid, this is not a separate aggravating circumstance because it was derivative of Thomas's criminal history. *See id.* (risk to re-offend does not stand as a separate aggravating factor). We are left, therefore, with two aggravating factors: (1) Thomas's criminal history; and (2) that Thomas committed these crimes while on parole.[5]

4.

Having found an irregularity in the trial court's sentencing decision, we have the option to: (1) remand to the trial court for a clarification or new sentencing determination; (2) affirm the sentence if the error is harmless; or (3) reweigh the proper aggravating and

[5] Thomas contends the trial court abused its discretion by imposing maximum, consecutive sentences because the trial court failed to "state separately its reason for enhancing a sentence and its reason for ordering sentences to be served consecutively . . . ." *Appellant's Brief* at 15. "Although enhancing a sentence and imposing consecutive sentences are separate and distinct decisions, they are governed by the same statutory aggravating circumstances." *Price v. State*, 725 N.E.2d 82, 86 (Ind. 2000); Ind. Code Ann. § 35-38-1-7.1 (West 2005). The same aggravating factors may be used to both enhance a presumptive sentence and to justify consecutive sentences. *McCarthy v. State*, 749 N.E.2d 528 (Ind. 2001). The trial court's decision to impose consecutive sentences for multiple offenses is generally within its discretion. *Id.* A single aggravating factor may be sufficient to support the imposition of consecutive sentences. *Id.* As we noted above, the trial court properly identified two aggravating factors, *i.e.*, Thomas has a lengthy criminal history and he committed the instant offenses while on parole.

mitigating circumstances independently at the appellate level. *Baber v. State*, 842 N.E.2d 343 (Ind. 2006). We elect the third option.

Thomas contends "[e]ven with good time credit this [140-year sentence] amounted to a life sentence[, which is] clearly inappropriate in this case." *Appellant's Brief* at 15. Pursuant to article 7, section 6 of the Indiana constitution, we have the constitutional authority to review and revise sentences where the sentence imposed is "inappropriate in light of the nature of the offense and the character of the offender." *Smith v. State*, 839 N.E.2d 780 (Ind. Ct. App. 2005); Ind. Appellate Rule 7(B). Appellate Rule 7(B) confers authorization to review and revise sentences when certain broad conditions are satisfied. *Smith v. State*, 839 N.E.2d 780. Nevertheless, our review under Appellate Rule 7(B) is very deferential to the trial court because of its special expertise in making sentencing decisions. *Id.* The presumptive sentences for the class of crimes to which the offenses belong are meant to be the starting point for the trial court's consideration of what sentences are appropriate for the crimes committed. *Id.*

At the time Thomas committed these crimes, the presumptive sentence for a class A felony was thirty years and the maximum was fifty years. I.C. § 35-50-2-4 (Ind. 2004). The presumptive sentence for a class B felony was ten years, and the maximum was twenty years. I.C. § 35-50-2-5 (Ind. 2004). Further, Thomas's sentence could be enhanced by a maximum of thirty years for being an habitual offender. I.C. § 35-50-2-8. Thus, Thomas's 140-year sentence was the maximum the trial court could have imposed upon Thomas's convictions after imposing the maximum for each conviction, imposing

the maximum enhancement for being an habitual offender, and ordering all sentences to be served consecutively.

The nature of the class A felony offense was that Thomas beat Clark severely with his fists and a gun, and stomped Clark with his feet, causing Clark's brain to bleed and leaving Clark with a fractured skull. Thomas continued to beat Clark after he became unconscious, and told him "I should've killed you[.]" *Transcript* at 51. At some point during the beating, Clark's clothes were removed. Clark spent several weeks in the hospital and suffered from memory loss and headaches. The nature of the three class B felonies was Thomas robbed the victims of nineteen items of personal property and made three victims remove their clothes. Regarding Thomas's character, he has a lengthy criminal record, including six felony convictions and seven misdemeanor convictions. His lengthy and recent criminal record, in addition to the fact that he committed the instant offenses while on parole, indicates an unwillingness to conform his conduct to the dictates of the law.

The nature of the class A felony offense and Thomas's character warrant the maximum sentence, *i.e.*, fifty years of imprisonment. Further, the trial court appropriately enhanced that sentence by thirty years pursuant to the determination that Thomas is an habitual offender. The three class B felonies, however, do not warrant maximum sentences. The three class B felony offenses, while intolerable, are, sadly, not "the worst of the worst." *Marshall v. State*, 832 N.E.2d 615, 625 (Ind. Ct. App. 2005), *trans. denied*. Thomas's aggregate sixty-year sentence imposed upon these convictions, therefore, is inappropriate. Rather, each offense warrants the presumptive sentence, *i.e.*,

a ten-year term of imprisonment, and all three sentences shall be served concurrently. We next turn to the class A felony vis-à-vis the three class B felonies. In light of the egregiousness of the class A felony and the fact that Thomas forced the victims to disrobe, it is appropriate that Thomas's eighty-year term of imprisonment imposed upon the class A felony be served consecutively to the three, concurrent ten-year sentences imposed upon the class B felonies.

Thus, Thomas's 140-year sentence is inappropriate, and we remand with instructions to enter the following sentences: (1) a fifty-year sentence for the class A felony conviction, enhanced by thirty years pursuant to the habitual offender determination, for an aggregate of eighty years; (2) a ten-year sentence for each of the three class B felony convictions, to be served concurrently; and (3) the eighty-year sentence and the three, concurrent ten-year sentences shall run consecutively, for an aggregate sentence of ninety years.

Judgment affirmed in part, reversed in part, and remanded with instructions.

MATHIAS, J., and BARNES, J., concur.